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No. 279

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The opinions in the Court of Claims (Appendix A, pp. 1a-9a) are reported at 181 F. Supp. 241.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1960, (Appendix A, p. 6a). On May 24, 1960, the time for filing this petition was extended by the Chief Justice to and including July 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

The question presented is whether the court below is in serious error and in conflict with the decisions

of this Court and the Court of Appeals for the Fifth Circuit in holding that penalty charges made for the privilege of prepaying an indebtedness fall within the statutory term "interest," notwithstanding contemporaneously adopted Treasury Regulations, thirty years of administrative practice, and explicit Congressional recognition, all to the contrary.

STATUTES AND REGULATIONS INVOLVED

Section 244(a) of the Revenue Act of 1921 (42 Stat. 261, Section 201(c)(1) of the Internal Revenue Code of 1939 (53 Stat. 1), and Section 803(a)(2) of the Internal Revenue Code of 1954 (68A Stat. 1) all provide that in the case "of a life insurance company the term 'gross income' means 'interest, dividends and rents.'" The complete text of these statutory provisions and the text of the Treasury Regulations promulgated thereunder are set forth in Appendix B, *infra*.

STATEMENT

For a great many years petitioner and other life insurance companies have treated as nontaxable, penalty charges received from borrowers for the privilege of anticipating due dates and amounts due under certain promissory notes and mortgages (R. 71 and 74), on the ground that such charges were not "interest" within the phrase "interest, dividends, and rents" —the only items of income taxable to life insurance companies under the Revenue Act of 1921 and successive statutes through 1954. These charges, which are not compensation for the use of money, represent consideration for the surrender or discharge of a valuable asset. After officially acquiescing in this view for over a generation, respondent, in 1957, for the first time, as-

serted a deficiency against petitioner for the taxable years 1950-1954 claiming that prepayment penalty charges fell within the statutory term "interest." After payment of the deficiency and the subsequent denial of its claim for refund thereof, petitioner brought suit in the Court of Claims. On March 2, 1960, the Court of Claims accepted respondent's contention, granted its motion for summary judgment, and ordered petitioner's claim dismissed. (R. 6a.)

The respondent's effort to expand the accepted meaning of a 30-year old statute and the Court of Claims' acquiescence in that effort took place against this background:[1] Prior to the Revenue Act of 1921, the gross income of all business corporations, including life insurance companies, consisted of income "derived from any source whatever." In the Revenue Act of 1921, however, the "gross income" of life insurance companies was limited to "interest, dividends and rents." This limited definition was reenacted by Congress nine times during the following 35 years.[2]

[1] There are presently pending in the federal courts at least four cases involving precisely the question presented here. Northwestern Mutual Life Insurance Company v. United States, No. 57-C-73 (D.C.E.D. Wis.); John Hancock Mutual Life Insurance Company v. United States, No. 59-243-M (D.C. Mass.); Metropolitan Life Insurance Company v. United States, No. 79-59, Ct. Cls.; and Prudential Insurance Company of America v. United States, No. 55-59, Ct. Cls. Moreover, since the taxable years 1950-1954 of many life insurance companies are still open, the issue is presented in either deficiency or refund status with respect to a large number of similarly situated taxpayers.

[2] The same statutory definition of the gross income of a life insurance company was reenacted by Congress as Section 244(a) of the Revenue Acts of 1924 and 1926 and as Section 202(a) of the Revenue Acts of 1928, 1932, 1934, 1936 and 1938. Subsequently the definition was incorported in the 1939 Code as Section 201(c) and in the 1954 Code as Section 803(a)(2).

Treasury Regulations 62, promulgated in 1922 shortly after the Revenue Act of 1921 was passed, defined the phrase "interest, dividends and rents" as follows:

> "Art. 671. Gross income of life insurance companies.—Net income in the case of life insurance companies is gross income from interest, dividends and rents less the deductions allowed by section 245. Gross income comprises items 25-34, inclusive, of the income page of the annual statement for life companies (edition of 1920) adopted by the National Convention of Insurance Commissioners . . . ."

During the following decade, the same provision was readopted by the Treasury on six different occasions as Article 671 of Regulations 65 and 69 and as Article 961 of Regulations 74 and 77.[3]

Six editions of the applicable Treasury Regulations thus defined the gross income of a life insurance company as comprising items 25-34, of the income page of the 1920 edition of the annual statement for life companies adopted by the National Convention of Insurance Commissioners. This annual statement for life companies, which was utilized by Congress in enacting the Revenue Act of 1921,[4] con-

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[3] In Regulations 86 promulgated under the Revenue Act of 1934 the provision in question was omitted and from 1934 on, the statutory definition was not supplemented by regulations. Nothing in Regulations 86 rescinded the provision contained in the earlier regulations. The provision was merely deleted, and as a substitute therefor the statutory language was repeated.

[4] Congress explicitly used the Convention Edition form of annual statement in adopting the Senate floor amendment adding section 246 to the House bill, H.R. 8245, which became the Revenue Act of 1921. Section 246(b)(1) and (7), respectively, of H.R.

tains a comprehensive listing of the items of income derived from any source whatever. As above indicated, income of a life insurance company derived from any source whatever was taxable under revenue acts prior to the Revenue Act of 1921. The annual statement divides such items of taxable income into three general categories: the first covers premium income, items 25-34 cover specific types of interest, dividends and rents, and the balance of the items, 35-40, list miscellaneous income, "From other sources."

Because the Treasury Regulations included only "items 25-34" in the gross income of a life insurance company after 1921, "item 36", among others, was not included. In Bulletin "H", which the Commissioner published on April 9, 1921, with respect to the taxation of life insurance companies *prior* to the Revenue Act of 1921, "item 36" is defined as "Bonuses received for prepayment or extension of mortgage loans," which were explained as follows (R. 221):

> "When a payment is received by a company either for the privilege of extending a mortgage held by it, or for the privilege of paying the principal of such mortgage in advance, the payment received constitutes gain and should be included in gross income,"

After enactment of the 1921 Act, Regulations 62 were issued. As pointed out above, Art. 671 of those Regulations stated that only items 25-34 were included in gross income, thus specifically excluding item 36.

8245, as thus amended, defined "gross income" and "expenses incurred" (in the case of insurance companies other than life or mutual) with specific reference to "the annual statement approved by the National Convention of Insurance Commissioners."

In consonance with this authoritative interpretation of the relevant statute, the Treasury for three decades after the 1921 Act regarded prepayment charges as not taxable to life insurance companies. In the mid-twenties it appears that the interpretation was questioned and resolved short of litigation when the Internal Revenue Service rendered formal administrative decisions granting claims for refund on the ground that such charges were not taxable as interest under the Revenue Act of 1921.[5] The Service also had occasion to consider the tax consequences to the payor of such charges and ruled that they were not deductible as interest because they were not paid for the use of borrowed money.[6]

Finally, in the Life Insurance Company Tax Act for 1955, which is applicable only to taxable years "beginning after December 31, 1954," Congress elected to tax life insurance companies on "gross investment income" which it defined as "interest, dividends, rents and royalties" and income received from "the entering into of any . . . mortgage . . . from which the life insurance company derives interest, rents or royalties and . . . the alteration or termination" of such a mort-

[5] Such administrative determinations were made in 1927 on the basis of claims for refund for the taxable years 1921 and 1922 filed by The Prudential Life Insurance Company of America and John Hancock Mutual Life Insurance Company.

[6] Rev. Rul. 55-12, 1955-1 Cum. Bull. 259. While the ruling recognized these charges as "business expenses" in proper cases this was of no significance to the numerous taxpayers who paid such charges with respect to non-business indebtedness, e.g., residential mortgages. The Service subsequently found it expedient to revoke this ruling without analysis or explanation after the Tax Court accepted the same view as the court below. Rev. Rul. 57-198, 1957-1 Cum. Bull. 94, General American Life Insurance Company, 25 T.C. 1265, 1267 (1956).

gage. In other words, where before 1955 the statute had reached "gross income" which was limited to "interest, dividends and rents" in 1955 the statute was extended to "gross investment income" and specifically included both interest and penalty prepayment charges.

Nonetheless, the court below permitted the respondent to repudiate a position long and consistently held and applied to numerous taxpayers, discounted the fact that Congress clearly thought a change in the statute was necessary to achieve the result desired by respondent, rejected the traditional meaning of the term interest, and found, after all these years, that when Congress used the term "interest" in 1921 it intended to tax penalty prepayment charges.

REASONS FOR GRANTING THE WRIT

The decision of the court below, which involves an important question of Federal income tax law, is contrary to the interpretation of the relevant statute found in contemporaneously adopted Regulations and evidenced by long-standing administrative practice, and is in conflict with decisions of this Court and with a decision of the Court of Appeals for the Fifth Circuit.

(1) The Court of Claims concluded that penalty prepayment charges are comprehended within the statutory term "interest" because it believed that the "general object" of those who formulated the Revenue Act of 1921 was to include all "investment income" within the phrase "interest, dividends and rents." But the undisputable fact is that neither the statute nor the regulations mention "investment income." Rather, it is the "gross income" of a life insurance company which is subject to tax, and since 1921 that

term has been defined as "interest, dividends and rents, *and nothing else.*" *John Hancock Mutual Life Insurance Co.*, 10 B.T.A. 736, 738 (1928), *acq.* VII-2 Cum. Bull. 20. Respondent's formal acquiescence in the *John Hancock* opinion, and the specific exclusion of all other types of income by Regulations 62 through 77, are precisely the kind of long-standing administrative precedent that this Court has found controlling in *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 352, and *FPC* v. *Panhandle Eastern Pipeline Company*, 337 U.S. 498, 513. A strikingly similar effort by the respondent to depart from a long-standing administrative interpretation of a revenue statute was rejected by this Court in *United States* v. *Leslie Salt Co.*, 350 U.S. 383, where Mr. Justice Harlan, speaking for a unanimous court, said (350 U.S. 396-397):

> "Against the Treasury's prior longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence, through the 1918 amendment to the statute (*supra*, p. 391), which has ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years."

Moreover, Bulletin "H" and Treasury Regulations 62 were published contemporaneously with the Revenue Act of 1921 by the very people who must have been consulted in the drafting of the 1921 Act. This in itself gives the views expressed in these publications overriding significance in determining the intent of Congress in 1921. As this Court held in *White* v. *Winchester Country Club*, 315 U.S. 32, 41, "substan-

tially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such, they are entitled to serious consideration, independently alike of reenactments of the statute while it was in force on the books . . .."

The decision below totally ignores the reenactment of Section 244(a) of the Revenue Act of 1921 by Congress nine times during the ensuring 34 years, and the reaffirmation by respondent for over a decade of the regulations excluding prepayment charges. Where there has been but a single reenactment this Court has found it to be controlling: *Cammarano* v. *United States*, 358 U.S. 498, 510; *Helvering* v. *Griffiths*, 318 U.S. 371, 395; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116. Thus the decision below rests upon an unwarranted disregard of highly relevant legislative and administrative history. While the court showed awareness of portions of this history and specifically recognized "that it was the consistent and unchallenged practice of the plaintiff and other life insurance companies from 1921 to 1950 to exclude prepayment receipts from taxable income" (R. 144), it justified its action under the erroneous impression that there had been no "conscious decision" (R. 145) authorizing what had unquestionably taken place in the administration of the relevant statute. Its error may, therefore, be attributed to an unawareness of positive evidence of such a "conscious decision" which does in fact exist.

Nor did the court below accord the 1955 amendment of the statute proper significance. Both the Senate and House Reports in support of that amendment un-

equivocally state that the definition of income under prior law was being "expanded."[7] The decisions of this Court establish that even in the absence of such illuminating legislative history, "the deliberate selection of language so differing from that used in the prior acts indicates that a change in the law was intended." *Brewster* v. *Gage*, 280 U.S. 327, 337; *United States* v. *Plesha*, 352 U.S. 202; *Spring City Foundry Co.* v. *Commissioner*, 292 U.S. 182.

In sum, the decision below is so clearly erroneous, does such violence to one of the most important income tax concepts and so substantially and unfairly affects the nation's life insurance industry that it requires the certiorari attention of this Court.

(2) Moreover, the court below adopted a definition of interest that is inconsistent with the decisions of this Court.[8] A uniform meaning of "interest" is highly desirable inasmuch as the term appears in more than forty sections of the Internal Revenue Code.

The classic meaning of interest is "compensation for the use or forbearance of money." *United States* v. *Childs*, 266 U.S. 304; *Deputy* v. *du Pont*, 308 U.S. 488. In *du Pont*, the Court considered the question of whether carrying charges on short sales of stock

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[7] H.R. Rep. No. 1098, 84th Cong., 1st Sess., pp. 6, 11; Sen. Rep. No. 1571, 84th Cong., 2d Sess., p. 6.

[8] It has been uniformly held that penalty charges imposed for the privilege of prepayment do not constitute interest within the meaning of usury statutes. *Silver Homes, Inc.* v. *Marx & Bensdorf, Inc.*, —— Tenn. ——, 333 S.W. 2nd 810 (1960); *Atlantic Life Ins. Co.* v. *Wolf*, 54 A. 2d 641, 642 (Mun. Ct. App. D.C. 1947); *Webb* v. *Southern Trust Co.*, 11 S.W. 2d 988, 989 (Ky. 1928); *Smithwick* v. *Whitley*, 67 S.E. 914, 915 (N.C. 1910).

could be regarded as interest paid or accrued, and held they could not, noting that the question had been early put to rest in *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, where "interest" had been defined as

> "the amount which one has contracted to pay for the use of borrowed money. It there rejected the contention that it meant 'effective interest' . . . or that 'Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term.' It refused to assume that Congress used the term with reference to 'some esoteric concept derived from subtle and theoretic analysis.'" 308 U.S. at 497-98.

In the *du Pont* decision the Court pointedly refused to broaden that definition so as to include what it called "effective interest."

> "In the business world 'interest on indebtedness' means compensation for the use or forbearance of money. In absence of clear evidence to the contrary, we assume that Congress had used these words in that sense. In sum we cannot sacrifice the 'plain obvious and rational meaning' of the statute even for 'the exigency of a hard case.'" 308 U.S. at 498.

(3) The decision below also conflicts with that of the Court of Appeals for the Fifth Circuit in *Campbell* v. *Great National Life Insurance Company*, 219 F. 2d. 693 (5th Cir. 1955).[2] There respondent asserted that royalties were to be included within the gross income

[2] The *Great National* case is not mentioned or cited in the decision of the court below, although it was called to the court's attention in the briefs of both parties and was relied on by the petitioner on oral argument, and its relevance to this issue is not disputed.

of a life insurance company on the ground that royalties were in the nature of "rents" and hence within the definition of "gross income." Respondent argued there, as it must here, that Congress "in defining the gross income of life insurance companies as including 'rent,' clearly intended to encompass all forms of investment income described by that term in its broad generic sense and thus to include royalties." 219 F. 2d at 695.

The Court of Appeals found respondent's argument to be "without support in either the terminology or the theory of the statute." The court distinguished between rent, which by definition is fixed in amount regardless of the extent of the use of the property within a given period, and royalties, which are compensation based entirely upon the use actually made of the property.

> "By defining statutory gross income to include only interest, dividends, and rents, the intention was disclosed to omit all other factors from consideration. The statute is clear and unambiguous and we are constrained to apply it according to its tenor and terms." (219 F. 2d at 696)

The decision below clearly conflicts with the tenor and terms of the governing statute, the established administrative interpretation and practice, and the relevant case law.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the decision of the Court of Claims and suggests that summary reversal would be appropriate.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Nos. 559-58, 560-58, 561-58, 562-58, 563-58

(Decided March 2, 1960)

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

v.

THE UNITED STATES.

Mr. Daniel M. Gribbon, for the plaintiff. *Messrs. John Lord O'Brian, Robert L. Hogg, Stuart McCarthy*, and *Covington & Burling* were on the briefs.

Mr. Jerry M. Hamovit, with whom was *Mr. Assistant Attorney General Charles K. Rice*, for the defendant. *Messrs. James P. Garland, Lyle M. Turner*, and *Jerome Fink* were on the brief.

ON MOTIONS BY PLAINTIFF AND DEFENDANT FOR PARTIAL SUMMARY JUDGMENT

REED, *Justice (Ret.)*, sitting by designation, delivered the opinion of the court:

These are cross-motions for partial summary judgment under Rule 51 of this court. Plaintiff seeks recovery of income taxes paid on mortgage and promissory note prepayment charges collected from borrowers during the years 1950-1954. The Commissioner of Internal Revenue has treated those prepayment charges collected during 1950-1953 as income under § 201(c)[1] of the Internal Revenue Code of 1939, and as to those charges collected during 1954

[1] IRC (1939) § 201(c)(1): "In the case of a life insurance company — (1) *Gross Income*. The term 'gross income' means the gross amount of income received during the taxable year from interest, dividends, and rents."

the same result was reached under § 803(a)(2) of the IRC of 1954.[2]

It is our judgment that the determination of the Commissioner was correct and that the prepayment charges are within the class of items covered by the term "interest" in the definition of life insurance company gross income found in § 201(c) of the IRC of 1939 and § 803(a)(2) of the IRC of 1954 as it then existed.

It is common practice to include in long-term corporate promissory notes provisions imposing a prepayment charge if the borrower prepays the principal before the maturity of the loan. In plaintiff's case this prepayment charge was based on a sliding scale ranging from three percent on the principal prepaid within five years of the loan to one-quarter of one percent on the principal prepaid in the nineteenth year of a loan. Plaintiff's mortgages typically provide for a prepayment charge of one-half of one percent per annum on the amount prepaid in excess of twenty percent of the principal during the first five years of the mortgage. During the taxable years 1950 to 1954 plaintiff states that it received $3,289,822.29 in mortgage prepayment charges and $1,706,531.00 in prepayment charges on corporate promissory notes.

The income taxation of life insurance companies presents unique problems. The cash receipts of life insurance companies consist of a return on invested funds as well as premiums and other receipts. It has long been recognized that only a small part of these total receipts resemble true income.[3] The vast bulk are accretions to reserve funds and will be returned eventually to the policyholders to indemnify them for the losses insured against. The Revenue Act of

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[2] IRC (1954 § 803(a)(2): "Gross Income.—The term 'gross income' means the gross amount of income received or accrued during the taxable year from interest, dividends and rents."

[3] *Helvering* v. *Oregon Mutual Life Ins. Co.*, 311 U.S. 267, 268-69; *National Life Insurance Co.* v. *United States*, 277 U.S. 508, 522-24 (dissenting opinion of Mr. Justice Brandeis); Subcomm. on Taxation of Life Insurance Companies of House Comm. on Ways and Means, *Report on Taxation of Life Insurance Companies* 4-12, 21-36 (1955).

1921[4] established the formula under which income taxation of life insurance companies is based on investment income to the exclusion of underwriting receipts. Taxable investment income was limited to "interest, dividends and rents." While income taxation of life insurance companies was repeatedly modified over the years, it retains its basic form. See the Life Insurance Company Income Tax Act of 1959, § 804(b)(1).[5]

The precise question before us was considered by the Tax Court in *General American Life Insurance Company*, 25 T.C. 1265 (1956). That court decided that prepayment charges are in reality an additional fee for the use of the lender's money for a shorter period of time than originally agreed upon, and that this fee represents the generally higher cost of a short-term, as opposed to a long-term loan. The charges are part of the compensation to the lender for the use of money. *Deputy* v. *duPont*, 308 U.S. 488, 498; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560-61. They are thus directly related to the economic cost of borrowing money and are not merely incidental to the loan transaction, but fall within the statutory term "interest."

This result conforms to the general object of those who formulated the Revenue Act of 1921. The Congress was approaching the problem of income taxation of life insurance companies from the standpoint of "investment income," and this income was to be the basis of the tax.[6] We

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[4] 42 Stat. 227.

[5] P.L. 86-69, 73 Stat. 112.

[6] S. Com. on Finance, 67th Cong., 1st Sess., Hearings on H.R. 8245, 83-84, 90 (1921). The excerpts are from the testimony of Dr. T. S. Adams, Tax Advisor of the Treasury Department. Dr. Adams was the only witness on the bill before the Senate Committee and was the only witness called by the House Committee to discuss the detailed provisions of the Act. Both committees looked to him for an authoritative explanation of the Act.

"Dr. ADAMS. Mr. Chairman, we left off at page 93, section 242. Gentlemen, the scheme in general in section 242 is this: It is to apply a tax on life insurance companies to make it applicable to investment income. Under the present law the premiums paid by

conceive of no reasonable distinction between prepayment and other charges for the use of money from the point of view of whether they are part of investment income. It would not be consistent with the broad statutory language of § 201(c) to give the term "interest" the narrow definition plaintiff seeks.[7] Prepayment and other interest charges are both received for the use of the company's capital and their rate is dependent in part on the length of time for which the capital is to be used. The 1956 amendments to the Code[8] modified the definition to specifically indicate

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a life insurance policyholder are deemed to be actual income by the life insurance company

* * * * *

It has been suggested—and I think it is obviously sound—that the only true basis of income of a life insurance company is its investment income—interest, dividends, and rents which it receives.

* * * * *

"Senator McCUMBER. Will you repeat again just how you propose to tax them?

"Dr. ADAMS. The scheme of taxation starts by defining their gross income as investment income, namely, their incomes from dividends, rents, etc. Then there are recorded against that certain deductions, which I will read.

* * * * *

"Dr. ADAMS. No; the other taxes they do not take. The only taxes they deduct are those connected with their investment income. Taxes based upon collection of premiums are not allowed as deductions.

"Senator McCUMBER. Why?

"Dr. ADAMS. Because we are taxing only the investment end of their business."

[7] *Helvering* v. *Midland Mutual Life Insurance Co.*, 300 U.S. 216, 223.

[8] 70 Stat. 36, 39, § 803(b):

"*Gross Investment Income.*—For purposes of this part, the term 'gross investment income' means the sum of the following:

"(1) The gross amount of income received or accrued from—

"(A) interest, dividends, rents, and royalties,

"(B) the entering into of any lease, mortgage, or other instru-

that it includes prepayment charges. We do not view these amendments as working any substantial change in the scope of the statute in regard to this problem.

During the thirty-five years the § 201(c) definition of life insurance company income was, in effect, little authority accumulated on what is encompassed within the statutory term interest. Although the statute is in broad terms, it was not supplemented by regulations or revenue rulings. We have inquired of counsel as to the practice of the Commissioner and within the industry during the twenty-nine year period between the passage of the Revenue Act of 1921 and 1950, the first year here litigated. Plaintiff asserts, and we do not understand defendant to deny, that it was consistent and unchallenged practice of the plaintiff and other life insurance companies from 1921 to 1950 to exclude prepayment receipts from taxable income. There are several other cases involving years prior to the 1956 amendments presently in litigation, but all have been brought in recent years, indeed all have been brought since the statutory definition was amended.[9]

The failure of the Commissioner to assert the taxability of these payments for over a generation tends to support the inference that these payments were not considered within the statutory term "interest." The want of assertion of power by those who presumably would be alert to exercise it has been considered significant in determining whether such power was actually conferred.[10] But we do

ment or agreement from which the life insurance company derives interest, rents, or royalties, and

"(C) the alteration or termination of any instrument or agreement described in subparagraph (B).

"(2) • • • "

[9] The Government has referred us to two civil refund suits now pending: *Northwestern Mutual Life Ins. Co.* v. *United States*, No. 57-C-73, D.C. E.D. Wis.; and *John Hancock Mutual Life Ins. Co.* v. *United States*, No. 59-243-M, D.C. Mass. In addition, the Government has raised the issue as a defense in two cases pending before this Court: *Metropolitan Life Ins. Co.*, No. 79-59; and *Prudential Insurance Co. of America*, No. 55-59.

[10] See *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U.S. 349, 352, where an amendment to grant the challenged power had been

not consider this negative inference sufficiently persuasive to form a basis for the construction of this statute sought by petitioner in view of the statutory purpose underlying income taxation of life insurance companies. We know of no positive evidence in the form of rulings, regulations, or requests to Congress for an extending amendment to the statute, leading us to the conclusion that any failure to assert a claim to these taxes was the result of a conscious decision on the part of the Commissioner.[11] We decline to base a decision which would run against what we conceive to be the grain of the statutory scheme and the commonly understood concept of interest on evidence which is at least as consistent with the view that there was never any consideration of this problem as it is with a conscious decision by the Commissioner that it was beyond the purview of the statute to tax these prepayment charges.[12]

The defendant's motion for partial summary judgment is granted, plaintiff's motion is denied. The causes of action stated in paragraphs six and seven of each of plaintiff's complaints are dismissed. The cause is remanded to the Commissioner for further proceedings on plaintiff's other causes of action.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, took no part in the consideration and decision of these cases.

---

sought by the Commission; and *Federal Power Comm'n* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513-14, where the practice of selling gas leases had been carried out by gas companies without Power Comm'n action to forbid it.

[11] Rev. Rul. 55-12, 1955-1 Cum. Bull. 259, holds that a penalty payment is not interest under § 23(b) of the 1939 IRC. A deduction for the prepayment charge as a business expense was allowed. From the taxpayer's viewpoint this had the same effect as an interest deduction. This ruling did not consider the insurance company section here involved. Moreover, it was revoked on the authority of the *General American* case. Rev. Rul. 57-198, 1957-1 Cum. Bull. 94.

[12] See *Estate of Sanford* v. *Comm'r*, 308 U.S. 39, 52-53; *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U.S. 325, 330-31.

LITTLETON, *Judge (Ret.)*, concurring:

Section 2 of the Life Insurance Company Tax Act for 1955, 70 Stat. 36, 39, which amended section 803 of the 1954 Internal Revenue Code, provides in part as follows:

> (b) *Gross Investment Income*—For purposes of this part, the term "gross investment income" means the sum of the following:
>
> (1) The gross amount of income received or accrued from—
>
> (A) interest, dividends, rents, and royalties,
>
> (B) the entering into of any lease, mortgage, or other investment or agreement from which the life insurance company derives interest, rents, or royalties, and
>
> (C) the alteration or *termination of any instrument or agreement described in subparagraph (B)*. [Emphasis supplied.]

The report[3] of the House Committee on Ways and Means which accompanied this Act when it was sent to the House of Representatives contains the following statements on page 6:

> The gross income of a life insurance company under present law is defined as interest, dividends, and rents. *This definition has been expanded* by including (1) royalties; (2) certain amounts received in connection with entering into, altering, or terminating agreements such as leases and mortgages; and (3) income derived from the operation of a noninsurance business. Royalties are considered to be similar to rents. Similarly, the receipts in connection with certain agreements are considered similar to the income received under the agreements. These amounts would include, for example, a bonus on entering into a lease and a penalty for early repayment of a mortgage.
>
> . . . . .

[3] H. Report No. 1098 (to accompany H.R. 7201), 84th Cong., 1st sess., dated July 11, 1955; U.S. Cong. and Adm. News, 84th Cong. 2d sess., 1956, vol. 2, p. 2253, 2277.

> Where appropriate, *these modifications* of the *definition of investment income* have also been applied to casualty insurance companies. For mutual casualty companies *there are added* to the present definition of income royalties, payments in connection with agreements, and income from a noninsurance business. [Emphasis supplied.]

Plaintiff vigorously urges that this language indicates that the Congress, in 1955, understood that the prior law did not include prepayment penalties such as those with which we are here concerned within the definition of "interest." I think that there is sufficient force to this contention to merit our consideration, although I do not find it sufficient to overcome the reasons, discussed in the opinion of the majority, which lead to the conclusion that these prepayment "penalties" are, in fact, interest, or a part of the compensation which is paid the lender for the use of its money. As was noted by the Tax Court in *General American Life Insurance Company*, 25 T.C. 1265, 1267, these penalty charges are, in substance, "an additional interest charge for the use of such money for such shorter period."

The force of the language in the legislative history of the 1955 Act is considerably lessened, I think, by the fact that it was language used by a Congress many years after the enactment of the provisions which plaintiff seeks to have it interpret. At most, it is indicative of what the later Congress thought the prior Congress had intended. Such an interpretation has very little, if any, significance. *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958). Cf. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282 (1947), and *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950). Also, it should be noted that the legislative history of the 1955 Act is not free of indications that Congress may have been of the opinion that it was not expanding the prior law with respect to the meaning of interest. For example, on page 10 of the House Ways and Means Committee's report, *supra*, appears the following sentence:

> *It is made clear* that income includes the gross amount received in conjunction with the making of any lease, mortgage, or other instrument or agreement from which the life insurance company will derive interest,

rents, or royalties, and the alteration or termination of any such lease, etc. [Emphasis supplied.]

Further, in the corresponding report of the Senate Committee on Finance,[14] at page 6, the language repeats *verbatim* the language of page 6 of the House Committee report quoted above, *except*, that this report says that this definition, of gross income, has been "*changed by expressly including* * * *" certain amounts, where the House report had said that the definition had been "*expanded by including*" those amounts. It is thus apparent that the Congress was not of one mind with respect to its interpretation of the prior law, and we cannot accept any indication from the legislative history of the 1955 Act as conclusive.

APPENDIX B

Section 244(a) of the Revenue Act of 1921

That in the case of a life insurance company the term "gross income" means the gross amount of income received during the taxable year from interest, dividends, and rents.

Section 201(c)(1) of the Internal Revenue Code of 1939

Gross income.—The term "gross income" means the gross amount of income received during the taxable year from interest, dividends, and rents.

Section 803(a)(2) of the Internal Revenue Code of 1954

Gross income.—The term "gross income" means the gross amount of income received or accrued during the taxable year from interest, dividends, and rents.

Article 671 of Treasury Regulations 62

Gross income of life insurance companies.—Net income in the case of life insurance companies is gross income from

---

[14] S. Report No. 1571 (to accompany H.R. 7201), 84th Cong., 2d sess. (dated February 23, 1956).

interest, dividends and rents less the deductions allowed by section 245. Gross income comprises items 25-34, inclusive, of the income page of the annual statement for life companies (edition of 1920) adopted by the National Convention of Insurance Commissioners and items 23-30, inclusive, of the income page of the annual statement for miscellaneous stock companies if any other branches of the insurance business are conducted by the company; except that the rental value of the space occupied by the company in its own building or buildings if included in gross income shall be determined according to the provisions of section 245(b) and article 686. As to "reserve funds required by law," see article 681.

Article 961 of Treasury Regulations 77

Gross income of life insurance companies.—Gross income in the case of life insurance companies means the gross amount of income received from interest, dividends, and rents, and comprises items 25-34 of the income page of the annual statement for life insurance companies (edition of 1920) adopted by the National Convention of Insurance Commissioners and items 23-30 of the income page of the annual statement for miscellaneous stock companies if any other branches of the insurance business are conducted by the company. As to "reserve funds required by law," see article 971.

COPY

No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1a-9a) is reported at 181 F. Supp. 241.

JURISDICTION

The order of the Court of Claims granting the Government's motion for partial summary judgment, and denying the taxpayer's cross-motion for partial summary judgment, was entered on March 2, 1960.

(Pet. 1a, 6a.) On May 24, 1960, this Court entered an order extending the taxpayer's time to file a petition for a writ of certiorari to and including July 30, 1960. The taxpayer filed its petition for a writ of certiorari on July 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims erred in holding that prepayment charges, paid to a life insurance company by borrowers for the privilege of prepaying the principal of their indebtedness before maturity, constituted taxable income to the insurance company as "interest" within the meaning of Section 201(c)(1) of the Internal Revenue Code of 1939 and its successor, Section 803(a)(2) of the 1954 Code.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 201 [As amended by Sec. 163(a) of the Revenue Act of 1942, chapter 619, 56 Stat. 798] LIFE INSURANCE COMPANIES.
>
> * * * *
>
> (c) *Other Definitions.*—In the case of a life insurance company—
>
> (1) *Gross income.*—The term "gross income" means the gross amount of income received during the taxable year from interest, dividends, and rents.
>
> * * * *

(26 U.S.C. 1952 ed. 201.)

Internal Revenue Code of 1954:

Subchapter L—Insurance Companies

PART I—LIFE INSURANCE COMPANIES

* * * *

SEC. 803. OTHER DEFINITIONS AND RULES.

(a) *Application of Section; Gross Income.*—

* * * *

(2) *Gross income.*—The term "gross income" means the gross amount of income received or accrued during the taxable year from interest, dividends, and rents.

* * * *

(26 U.S.C. 1952 ed., Supp. II, 803)

STATEMENT

The taxpayer is a life insurance company. In accordance with common practice, the taxpayer included in its long-term promissory notes and mortgage instruments, reflecting its loans to third parties, provisions imposing charges for the privilege of prepaying the principal of the loan before maturity. The taxpayer's prepayment charges ranged from 3% on principal amounts prepaid within five years of the loan to ¼ of 1% on principal amounts prepaid in the nineteenth year of the loan. During the taxable years 1950-1954 the taxpayer received in excess of $3,200,000 in mortgage prepayment charges and in excess of $1,700,000 in prepayment charges on promissory notes.

The Commissioner determined deficiencies against the taxpayer for the years 1950-1954, upon the ground that the taxpayer should have included the

prepayment charges in its gross income. Following the payment of these deficiencies and denial of its claim for refund, the taxpayer brought the instant refund suit. Both the taxpayer and the Government moved for partial summary judgment with respect to the issue involving the prepayment charges. The Court of Claims granted the Government's motion and remanded the case to its Commissioner for further proceedings on the taxpayer's other causes of action. (Pet. 6a.)

ARGUMENT

The issue presented is whether prepayment charges, collected by a life insurance company as lender for the privilege of prepaying loans prior to maturity, constitutes taxable income to the insurance company. Section 201(c)(1) of the Internal Revenue Code of 1939, *supra*, p. 2, and its successor, Section 803(a)(2) of the 1954 Code, *supra*, p. 3, define the taxable gross income of life insurance companies as "the gross amount of income * * * from interest, dividends, and rents." In the present case, the Court of Claims has held that the prepayment charges received by the taxpayer constituted "interest" within the meaning of Sections 201(c)(1) and 803(a)(2).

1. The decision below is correct, and the taxpayer errs in asserting (Pet. 10-12) that it is inconsistent with decisions of this Court and conflicts with a decision of the Fifth Circuit. As the court below held (Pet. 3a), in agreement with the recent decision in *General American Life Insurance Co.* v. *Commis-*

sioner, 25 T.C. 1265, prepayment charges constitute additional fees for the use of the lender's money for a shorter period of time than originally agreed upon, thus representing the higher cost of a short-term, as opposed to a long-term, loan. Prepayment charges are geared to the lender's costs in a manner designed to compensate it for the loss of interest income it would have received if the loan were outstanding to maturity. American Institute of Banking, *Home Mortgage Lending*, p. 141; Hoagland, *Real Estate Finance*, pp. 81, 243, 259, 405. Thus prepayment charges are, in fact, a part of the cost to the borrowers for the use of the lender's money. These charges are therefore "interest" within this Court's definition of the term for the purposes of the federal tax laws as "compensation for the use or forbearance of money." *Deputy* v. *duPont*, 308 U.S. 488, 498; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560-561. No narrower construction of the term "interest," as employed in defining the taxable income of life insurance companies, is required or suggested by the legislative history of these provisions or by any relevant decision. On the contrary, it is clear from legislative history, as recognized by the court below (Pet. 3a-4a), that the earliest predecessor of Section 201(c)(1) was enacted in 1921 in order to limit the income taxation of life insurance companies to their *investment* income, as distinct from their underwriting income.[1] Hence, the terms "interest, divi-

[1] See, more fully, Hearings before the Senate Committee on Finance, 67th Cong., 1st Sess., on H. R. 8245, pp. 83, 84;

dends, and rents" should be construed realistically to reach all investment income which falls within the described categories, unless it appear affirmatively that Congress did not intend to include a particular species of investment income. As this Court said in *Helvering* v. *Midland Ins. Co.*, 300 U.S. 216, 223: "The terms 'interest,' 'dividends,' and 'rents,' * * * were plainly used by Congress in their generic meanings, as broadly descriptive of certain kinds of 'interest.'"

It is evident, then, that the taxpayer errs in asserting inconsistency between the instant decision and the decisions by this Court in *Deputy* v. *duPont*, *supra*, *Old Colony R. Co.* v. *Commissioner*, *supra*, and allied cases; and the taxpayer is equally mistaken in asserting a conflict with *Campbell* v. *Great National Life Insurance Co.*, 219 F.2d 693 (C.A. 5). In the *Great National* case, the Fifth Circuit held that royalties did not constitute "rents" within the meaning of Section 201(c)(1). The court reached this decision upon the ground that, in its view, the word "rents" in its common and usual meaning does not include royalties; that Congress had often expressly distinguished between rents and royalties in revenue legislation; and that the failure of Congress to provide a depletion deduction with respect to royalties received by life insurance companies, although such

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61 Cong. Record, Part 5, p. 5342; H. Rep. No. 350, 67th Cong., 1st Sess., p. 14 (1939-1 Cum. Bull (Part 2) 168, 178); S. Rep. No. 275, 67th Cong., 1st Sess., p. 20 (1939-1 Cum. Bull. (Part 2) 181, 195); S. Rep. No. 617, 65th Cong., 3d Sess., p. 9 (1939-1 Cum. Bull. (Part 2) 117, 123).

a deduction is allowed for other taxpayers who must include royalties in their taxable income, constitutes an additional and highly persuasive indication that Congress did not intend to tax royalties in the hands of life insurance companies.[2] Thus the result reached in the *Great National* case, as well as its rationale, is not in conflict with the decision in the instant case.

2. The question is not one of continuing importance. Prepayment charges were made expressly taxable in the hands of life insurance companies by Section 2 of the Life Insurance Company Tax Act for 1955, Chapter 83, 70 Stat. 36, amending Section 803 (a)(2) of the 1954 Code, *supra*, p. 3, for years beginning after December 31, 1954. As for the four pending cases which the taxpayer cites (Pet. 3, n. 1) as involving the issue, two (*Metropolitan Life Ins. Co.* v. *United States*, C. Cls. No. 79-59, and *Prudential Ins. Co. of America* v. *United States*, C. Cls. No. 55-59) raise this issue only by way of setoff. Should the taxpayers in those two cases be unsuccessful in their suits for refund, the issue will not be reached since their taxable years prior to 1955 are closed for purposes of assessing deficiencies. It is

---

[2] Here the taxpayer has taken as a deduction all expenses incidant to its assessment and collection of prepayment charges, as well as its expenses incident to placement of the loans giving rise to these prepayments.

[3] Judge Rives' dissenting opinion in the *Great National* case (219 F.2d at pp. 697-699) presents materials additional to those discussed in the text herein, confirming the intent of Congress to reach the investment income of life insurance companies, as distinguished from its underwriting receipts.

merely speculation to suggest that the issue will be raised and litigated for taxable years prior to 1955 with respect to many other life insurance companies.

3. The administrative practice, insofar as it supports the taxpayer's position at all, does so by reason of inaction rather than by any affirmative adoption of the construction urged by the taxpayer. In no general ruling has the Commissioner or the Department of the Treasury since the adoption of the law in 1921 expressly excluded prepayment charges from the taxable income of insurance companies. The granting of claims for refunds in two isolated cases referred to by the petitioner (Pet. 6) for the years 1921 and 1922 fall far short of constituting an established administrative practice. See *Automobile Club* v. *Commissioner*, 353 U.S. 180. Moreover, there is no indication whatsoever that such action ever came to the attention of Congress.[4]

---

[4] The petitioner's references to Article 671 of Treasury Regulations 62, promulgated in 1922, and to Bulletin H published in 1921 (Pet. 4-5), confuse, rather than clarify, the issue. Although the regulations define gross income of insurance companies by reference to items 25-31 of the income page of the annual statement for life companies (edition 1920), they can hardly have reference to the items listed in Bulletin H since that would result in excluding from taxable income not only prepayment fees (item 36), but also gross interest on mortgage loans (item 21). Actually item 36 of the insurance companies' statement included in Bulletin H is a blank line following item 35 which introduces it as "[Income] From other sources." The Bulletin, published prior to the Revenue Act of 1921 and having no relation to such Act, undertook to give examples of such income. There is no indication that in adopting Article 671 of Regulations 62 in 1922 there was an intention to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES K. RICE,
Assistant Attorney General.

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JERRY M. HAMOVIT,
Attorneys.

August, 1960.

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adopt this interpretation applicable to a different statute and to a different edition of the annual statement for life companies.

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FILED
SEP 22 1975
JAMES R. BROWN

Supreme Court of the United States

REPLY MEMORANDUM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 279

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Petitioner*

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM

While the correctness of the decision below and the extent to which it conflicts with prior decisions are properly matters for argument, the administrative position that the Government has consistently taken for over thirty years with respect to prepayment charges should be a matter of fact. Petitioner believes that the Government's Brief in Opposition (Footnote 4, page 8) is inexcusably misleading in this respect.

Treasury Regulations 62, promulgated under the Revenue Act of 1921, through Treasury Regulations 77, promulgated under the Revenue Act of 1932, continuously defined the gross income of life insurance companies, *i.e.*, "interest, dividends and rents," as being comprised only of "items 25-34" of the "Income Page of the Annual Statement for Life Companies (Edition of 1920)." If these "items" did not include prepayment charges as interest—and the Government knows that they did not—a generation of Treasury practice based on such Regulations cannot be disregarded as mere "inaction." (Gov. Br. p. 8).

The Government would relegate its own Regulations to obscurity by reading them not in terms of the 1920 Edition of the Income Page, to which explicit reference is made in the Regulations, but rather in terms of another edition of the Income Page, which is nowhere mentioned in the Regulations (Footnote 4, page 8). The Government creates confusion out of the fact that the numbering of the income items in the Bulletin "H" Edition of the Income Page does not coincide by one with that contained in the 1920 Edition of the Income Page and referred to in the Regulations. A casual comparison of the two editions, which are attached and which were available to Government counsel, makes clear that the difference is quite immaterial.

The difference in numbering is due solely to the addition in the 1920 Edition of a new item numbered 6 relating to disability premiums, which are not involved here. This item did not appear in the Bulletin "H" Edition. Items 25-34 of the 1920 Edition correspond precisely with Items 24-33 of the Bulletin "H" Edition; Item 36 of the 1920 Edition and Item 35 of the

Bulletin "H" Edition have exactly the same heading, "[Income] From Other Sources (give items and amounts)"; and Bulletin "H" specifically states that prepayment charges are among the items to be reported under this heading.

The language used in Article 671 of Treasury Regulations 62 is too exact to succumb to the Government's unwarranted attempt to render it meaningless. The fact is that in Bulletin "H" the Government ruled that prepayment charges were not included in those items denominated "interest" but were, rather, included only as "income from other sources." Then, for over a decade the Treasury Regulations stated that the gross income of a life insurance company was "comprised of Items 25-34, inclusive", of the Income Page from the 1920 Edition which items related only to "interest, dividends and rents." Thus, contrary to the Government's belated assertion, they comprehended Item 25—"Gross interest on mortgage loans" through Item 34—"Gross rent from company's property" just as they clearly excluded income "From Other Sources," which was defined in Bulletin "H" as including prepayment charges. This official position was repromulgated for over a decade, and thirty years of administrative practice have been based upon it.

What the Government has done here, and what the court below has condoned, is precisely what this Court has condemned in a series of cases culminating in *United States* v. *Leslie Salt Co.*, 350 U.S. 383—to substitute a recent *ad hoc* contention for "the Treasury's

prior long-standing and consistent administrative interpretation . . . ."

Respectfully submitted,

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September 19, 1960

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No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The petitioner's reply memorandum appears to misconceive the Government's position. It was, and is, our position that, under the scheme of insurance company taxation in issue, any administrative treatment (with the exception of the two isolated instances in 1921 and 1922) of prepayment fees as income "from other sources" has been through inaction rather than affirmative construction. Article 671 of Treasury Regulations 62, and its successors, by reference to the insurance forms for financial statements, excluded the items dealing with income from other sources, but it did not indicate whether the income resulting from fees for pre-

Appendix A

Income page of the Annual Statement for Life Companies (Edition of 1920) adopted by National Convention of Insurance Commissioners

I—CAPITAL STOCK

1. Amount of capital paid up, ... $.....
2. Amount of ledger assets (as per balance) December 31 *of previous year*, ... $.....
3. ...crease of capital during the year, ...
4. Extended at ..... $.....

II—INCOME

5. First year's premiums on original policies, without deduction for commissions or other expenses, less $..... for first year's reinsurance, ...
6. (a) First year's premiums for Total and Permanent Disability Benefits, less $..... for first year's reinsurance, ...
   (b) For additional Accidental Death Benefits included in life policies, less $..... for first year's reinsurance, ...
7. Surrender values applied to pay first year's premiums, ...
8. First year's premiums on original policies ..... $.....
9. Dividends applied to purchase paid-up additions and annuities, ...
10. Surrender values applied to purchase paid-up insurance and annuities, ...
11. Consideration for original annuities involving life contingencies, ...
12. New premiums, ... $.....
13. Renewal premiums (in addition to items 15, 17 and 18), without deduction for commissions or other expenses, less $..... for reinsurance on renewals, ...
14. (a) Renewal premiums for Total and Permanent Disability Benefits, less $..... for reinsurance on renewals, ...
    (b) For additional Accidental Death Benefits included in life policies, less $..... for reinsurance on renewals, ...
15. Dividends applied to pay renewal premiums, ...
16. Dividends applied to shorten the endowment or premium paying period, ...
17. Surrender values applied to pay renewal premiums, ...
18. Renewal premiums for deferred annuities, ...
19. Renewal premiums, ...
20. Premium income, ...
20A. Premiums reported during year, on U. S. monthly difference lists, to War Risk Insurance Bureau in accordance with the Soldiers' and Sailors' Civil Relief Act, ...
20B. Total, items 5-20A inclusive, ...
21. Consideration for supplementary contracts involving life contingencies, ...
22. (A) Consideration for supplementary contracts *not* involving life contingencies, ...
23. Dividends left with the company to accumulate at interest, ...
24. Ledger assets, other than premiums, received from other companies for assuming their risks .....
25. Gross interest on mortgage loans, less $..... accrued interest on mortgages acquired during 1920. $.....
26. Gross interest on collateral loans, per Schedule C .....
27. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 1920, per Schedule D, ...
28. Gross interest on premium notes, policy loans or liens, including $..... interest received on bonds deposited with the company under the Soldiers' and Sailors' Civil Relief Act, ...
29. Gross interest on deposits in trust companies and banks per Schedule E, ...
31. .....

Appendix B

Income page of Annual Statement for Life Companies (Convention Edition), page 24, Bulletin "H", April 9, 1921

I.—CAPITAL STOCK

1. Amount of capital paid up in cash, ... $.....
2. Amount of ledger assets (as per balance) December 31 *of previous year*, ... $.....
3. ...crease of capital during the year, ...
4. EXTENDED AT ..... $.....

II.—INCOME

5. First year's premiums on original policies, without deduction for commissions or other expenses, less $..... for first year's reinsurance, ... $.....
6. Surrender values applied to pay first year's premiums, ...
7. Total first year's premiums on original policies, .. $.....
8. Dividends applied to purchase paid-up additions and annuities, ...
9. Surrender values applied to purchase paid up insurance and annuities, ...
10. Consideration for original annuities involving life contingencies, ...
11. Consideration for supplementary contracts involving life contingencies, ...
12. Total new premiums, ... $.....
13. Renewal premiums (in addition to items 14, 16, and 17), without deduction for commissions or other expenses, less $..... for reinsurance on renewals, ... $.....
14. Dividends applied to pay renewal premiums, ...
15. Dividends applied to shorten the endowment or premium-paying period, ...
16. Surrender values applied to pay renewal premiums, ...
17. Renewal premiums for deferred annuities, ...
18. Total renewal premiums, ...
19. Extra premiums for total and permanent disability benefits $..... and for additional accidental death benefits $..... included in life policies, ...
20. Total premium income, ... $.....
21. (a) Consideration for supplementary contracts *not* involving life contingencies, ...
22. Dividends left with the company to accumulate at interest, ...
23. Ledger assets, other than premiums, received from other companies for assuming their risks, ...
24. Gross interest on mortgage loans, per Schedule B, less $..... accrued interest on mortgages acquired during 19..... $.....
25. Gross interest on collateral loans, per Schedule C, ...
26. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 19....., per Schedule D, ...
27. Gross interest on premium notes, policy loans or liens, ...
28. Gross interest on deposits in trust companies and banks, per Schedule E, ...
29. Gross interest on other debts due the company (give items and amounts), ...
30. .....
31. .....
32. Gross discount on claims paid in advance, ...
33. Gross rent from company's property, including $..... for company's occupancy of its own buildings, per Schedule A, ...
34. Total gross interest and rents, ...
35. From other sources (give items and amounts): $.....
36. .....
37. .....

payments fell in that category or in the item dealing with interest, which is the issue now being raised.

In order to show an affirmative administrative construction supporting its position, the petitioner referred to Bulletin H, which did treat prepayment charges as income from other sources. The brief in opposition merely pointed out that Bulletin H had reference to a prior statute (which, we note, did not distinguish between interest and income from other sources) and identified the items of insurance company income by reference to a different list from that incorporated in the Treasury Regulations. The point was, and is, that the Treasury Regulations cited made no reference to Bulletin H and that there is no basis for arguing that they adopted the interpretation contained therein which was made without reference to the issue on taxability involved in those Regulations and in this case. In short, as Mr. Justice Reed's opinion for the Court of Claims concluded (Pet. 6a), there is "no positive evidence * * * that any failure to assert a claim to these taxes was the result of a conscious decision on the part of the Commissioner."

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER, 1960.

20B. Total, items 5-20A inclusive, ...

21. Consideration for supplementary contracts involving life contingencies, ...

22. (A) Consideration for supplementary contracts *not* involving life contingencies, ...

23. Dividends left with the company to accumulate at interest, ...

24. Ledger assets, other than premiums, received from other companies for assuming their risks .....

25. Gross interest on mortgage loans, less $..... accrued interest on mortgages acquired during 1920.. $.....

26. Gross interest on collateral loans, per Schedule C.....

27. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 1920, per Schedule D, ...

28. Gross interest on premium notes, policy loans or liens, including $..... interest received on bonds deposited with the company under the Soldiers' and Sailors' Civil Relief Act, ...

29. Gross interest on deposits in trust companies and banks, per Schedule E, ...

31. .....

32. .....

33. Gross discount on claims paid in advance, ...

34. Gross rent from company's property, including $..... for company's occupancy of its own buildings, less $..... interest on incumbrances per Schedule A, ...

35. Total interest and rents, ...

36. From other sources (give items and amounts):

37. ..... $.....

38. .....

39. .....

40. .....

41. From agents' balances previously charged off, ...

42. Borrowed money (gross) .....

43. Gross profit on sale or maturity of ledger assets, viz.:
(a) Real estate, per Schedule A, ... $.....
(b) Bonds, per Schedule D, ...
(c) Stocks, per Schedule D, ...

44. Gross increase, by adjustment, in book value of ledger assets, viz.:
(a) Real estate, per Schedule A, ... $.....
(b) Bonds, per Schedule D, (including $..... for accrual of discount), ...
(c) Stocks, per Schedule D. ....

45. Total Income, ... $

46. Amount carried forward, ... $

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

* Company is at liberty to briefly state transaction, so that explanation can be carried as footnote in department report.

(Emphasis indicated by bracket and arrow supplied.)

during 19..... $.....

25. Gross interest on collateral loans, per Schedule C, ...
26. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 19...., per Schedule D, ...
27. Gross interest on premium notes, policy loans or liens, ..
28. Gross interest on deposits in trust companies and banks, per Schedule E, ...
29. Gross interest on other debts due the company (give items and amounts), ...
30. .....
31. .....
32. Gross discount on claims paid in advance, ...
33. Gross rent from company's property, including $..... for company's occupancy of its own buildings, per Schedule A, ...

34. Total gross interest and rents, ...
35. From other sources (give items and amounts): $.....
36. .....
37. .....
38.
40. From agents' balances previously charged off, ...
41. Borrowed money (gross).* .....
42. Gross profit on sale or maturity of ledger assets, viz.: $.....
    (a) Real estate, per Schedule A, ...
    (b) Bonds, per Schedule D, ...
    (c) Stocks, per Schedule D, ...

43. Gross increase, by adjustment, in book value of ledger assets, viz.: $.....
    (a) Real estate, per Schedule A, ...
    (b) Bonds, per Schedule D (including $..... for accrual of discount), ...
    (c) Stocks, per Schedule D, ...

44. TOTAL INCOME ..... $.....
45. Amount carried forward. ..... $.....

(a) Including commuted value of installments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of disbursements.
* Company is at liberty to briefly state transaction, so that explanation can be carried as footnote in department report.

(Emphasis indicated by bracket and arrow supplied.)